UNITED STATES OF AMERICA
BEFORE NATIONAL LABOR RELATIONS BOARD

CTS CONSTRUCTION, INC. **Employer** **and,** **JAMES MONAHAN, II** **Petitioner** **and,** **LOCAL 4322, COMMUNICATIONS WORKERS OF AMERICA (CWA), AFL-CIO, CLC** **Union.**	**Case 09-RD-187368**

LOCAL 4322, COMMUNICATIONS WORKERS OF AMERICA (CWA), AFL-CIO, CLC'S BRIEF IN OPPOSITION TO CTS CONSTRUCTION, INC.'S MOTION FOR RECONSIDERATION

Communications Workers of America, AFL-CIO, CLC and its Local 4322 (collectively "Union") hereby submit their Brief in Opposition to CTS Construction, Inc.'s Motion for Reconsideration. The Employer has not raised any extraordinary circumstances or material mistakes of law or fact warranting reconsideration of the Board's decision in the above captioned matter. The Board should therefore DENY the Employer's Motion for Reconsideration. The Union's Brief in Opposition to the Employer's Motion for Reconsideration is attached hereto.

Respectfully submitted,

s/ *Matthew R. Harris*

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BRIEF IN OPPOSITION

I. FACTS

On or about April 27, 2016, while the Union was attempting to negotiate a successor collective bargaining agreement, a decertification petition was filed in the affected bargaining unit (09-RD-174948). The Union filed a Request to Block on or about April 29, 2016, and contemporaneously filed a corresponding ULP Charge (09-CA-175155). The Request to Block was granted on May 2, 2016. The Union filed additional Charges thereafter (09-CA-177652; 09-CA-177660; 09-CA-177687; 09-CA-182889). The Charges were consolidated.

The decertification petition was approved for voluntary withdrawal on September 8, 2016. The Parties entered into a Settlement Agreement, which was approved by the Regional Director on September 23, 2016. Pursuant to that Agreement, the Employer agreed to refrain from serious misconduct such as,

1. Providing assistance to the decertification effort,
2. Failing and refusing to schedule regular bargaining sessions,
3. Failing to designate a negotiating agent with the authority to bargain,
4. Unilaterally granting pay increases without giving the Union an opportunity to bargain, and
5. Telling employees their raises would be withheld because of Union activity.

Additionally, a mandatory bargaining schedule and notice posting were agreed to as part of the Settlement Agreement. The bargaining schedule required the Employer to bargain a minimum of eighteen hours per month upon request. The Notice was posted on or about October

4, 2016, and mailed to employees individually on or about October 10, 2016. The Settlement Agreement required that the Notice remain posted for sixty days.

The Employer met with the Union only once after the Settlement Agreement was approved. On November 1, 2016, the Petitioner filed the instant decertification petition (09-RD-187368). The Union filed its Position Statement and Request to Block on November 2, 2016. The Request to Block was granted on or about November 4, 2016. Subsequently, the Regional Director dismissed the Petition on November 17, 2016.

On or about November 30, 2016, Petitioner, acting through counsel, filed a Request for Review in the above-captioned case (09-RD-187368). On or about December 1, 2016, the Employer filed a similar Request for Review.

The Board rendered its Decision on May 31, 2017, finding, "The Employer's Request for Review of the Regional Director's administrative dismissal of the petition is denied as it raises no substantial issues warranting review." *CTS Construction, Inc.*, unreported, case no. 09-RD-187368, 2017 WL 2402772, *1 (NLRB May 31, 2017) After applying the factors set forth in *Poole Foundry* and its progeny (cited *infra*), the Board noted, "The short amount of time elapsed since the commencement of bargaining, the number of bargaining sessions, the fact that the parties were on the cusp of finalizing an agreement, and the absence of a bargaining impasse clearly outweigh any other factors which might suggest that a reasonable period of time to bargain had elapsed." *Id*. at fn. 1.

On or about June 26, 2017, the Employer filed its Motion for Reconsideration, reincorporating arguments already rejected by the Board, and positing an argument not previously raised. A copy was served on the Union via email on June 28, 2017.

II. STANDARD OF REVIEW

"A party to a proceeding before the Board may, because of ***extraordinary circumstances***, move for reconsideration . . . of the record after the Board decision or order." Board's Rules and Regulations §102.48(c)(1)[1]. (emphasis added) Further, a Motion for Reconsideration "must state with particularity the ***material error*** claimed and with respect to any finding of material fact, must specify the page of the record relied upon." *Id*. (emphasis added) Thus, a party must demonstrate extraordinary circumstances or a material error warranting reconsideration; mere disagreement with the Board's decision is not enough. *Pressroom Cleaners*, 361 NLRB No. 133 (2014); *Cellco Partnership*, unreported, case no. 28-CA-145221, 2017 WL 1462126, *1 (April 21, 2017 NLRB); *UPMC*, unreported, case no. 06-CA-081896, 2016 WL 7100574, *1 (December 5, 2016 NLRB).

Analogous to the standard applied in federal courts, "the purpose of a motion for reconsideration is to correct manifest errors of law or fact . . ." *See, e.g., Arnold v. ADT Sec. Servs., Inc*., 627 F.3d 716, 721 (8th Cir. 2010). "The purpose of a motion for reconsideration is not to repeat arguments which were already found to be unpersuasive." *Judicial Watch, Inc. v. U.S. Department of Energy*, 319 F.Supp.2d 32, 34 (2004); *accord Wang Theatre, Inc*., 365 NLRB No. 33 (2017) (Board dismissing motion for reconsideration, Member Miscimarra noting in concurrence, "When deciding whether to grant summary judgment in a test-of-certification case, the Board does *not* permit the parties to engage in a repeat litigation of claims that were unsuccessfully argued in the underlying representation case."). (emphasis original) A motion for reconsideration should therefore be denied "when it merely asserts 'arguments for

[1] The Employer cites to the Board's Rules and Regulations §102.48(d)(1). (*See* Er. Mtn. for Reconsideration, p. 1) The Union cites to the Board's updated Rules and Regulations §102.48(c)(1).

reconsideration [that] the court has already rejected on the merits.'" *BEG Invs., LLC v. Alberti*, 85 F.Supp.3d 54, 58 (D.D.C.2015).

III. AUTHORITY AND ARGUMENT

A. The Employer Has Not Demonstrated Extraordinary Circumstances or Material Errors of Law or Fact.

Here, the Employer has not asserted any material errors with respect to Board's application of law or fact, nor has the Employer offered any extraordinary circumstances justifying reconsideration. Rather, the Employer merely requests that the Board reexamine arguments it has already rejected.

1. *The Employer Has Not Demonstrated that the Board Misapplied Applicable Law. Rather, the Employer Merely Contends that the Board Should Re-Apply the Same Law, Only This Time In the Employer's Favor.*

With respect to the Board's application of the law, the question before the Board was whether the Regional Director's administrative dismissal of a petition for decertification raised substantial issues warranting review. 2017 WL 2402772 at *1. The Board concluded that no substantial issues were raised and denied review accordingly. *Id*. In a footnote, the Board examined and applied the balancing test set forth in *Poole Foundry & Machine Co*., 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952) and its progeny, in assessing whether "the parties had bargained for a reasonable period of time when the instant petition was filed." 2017 WL 2402772 *1 at fn. 1. The factors examined by the Board were: (1) whether the parties were bargaining for an initial agreement, (2) the complexity of the issues being negotiated and the parties' bargaining procedures, (3) the total amount of time elapsed since bargaining commenced and the number of bargaining sessions, (4) the presence or absence of a bargaining impasse (hereinafter "*Poole Foundry* balancing test"). *Id*. The Board noted that

that the first two factors weighed in favor of finding that a reasonable period of time to bargain had elapsed, but ultimately held that all remaining factors supported the opposite conclusion. *Id.* Specifically, the Board concluded, "The short amount of time elapsed since the commencement of bargaining, the number of bargaining sessions, the fact that the parties were on the cusp of finalizing an agreement, and the absence of a bargaining impasse clearly outweigh any other factors which might suggest that a reasonable period of time to bargain had elapsed." *Id.*

The Employer does not contend that the Board applied the wrong authority. Rather, the Employer merely rehashes the same arguments presented in its Request for Review, arguing, unsurprisingly, that the Board should reapply the *Poole Foundry* balancing test in its favor: "Based on a thorough analysis of the *Poole* factors, the initial decision by the Board was erroneous because . . . the factors set forth by *Lee Lumber* and under the *Poole* framework weigh in favor of CTS." (Er. Mtn. for Reconsideration, p. 11) There is no colorable contention that the Board misapplied the *Poole Foundry* balancing test. The Board specifically weighed each factor and found that, overall, the test weighed in favor of dismissing the petition because a reasonable period for bargaining had not elapsed at the time it was filed. *Id.*

Mere disagreement with the Board's conclusion does not translate into a material error of law or a basis for reconsideration. Board's Rules and Regulations §102.48(c)(1).

2. *The Employer Has Not Demonstrated the Board Relied Upon a Material Error of Fact.*

With respect to the Board's application of the facts, the Employer has failed to cite any errors, let alone material errors. The closest the Employer comes to alleging errors of fact are in the following two areas cited in its Motion for Reconsideration:

First, the Employer states, "In its initial decision, the majority was persuaded to rule against CTS on the basis that only one bargaining session took place between the parties. This is

inaccurate." (Er. Mtn. for Reconsideration, p. 9) The Board's finding in this respect was as follows: "[T]he parties met only one time *after the settlement agreement was executed*." (emphasis added) 2017 WL 2402772 *1 at fn. 1. This is accurate and was acknowledged by the Employer in the very next sentence of its Motion: "CTS only met once with the Union after the execution of the Settlement Agreement . . ." (Er. Mtn. for Reconsideration, p. 9) There was no material error of fact in this respect.

Second, the Employer states, "The parties were not 'on the cusp' of an agreement – they had an agreement, subject only to ratification by the Union itself." (*Id*. at p. 10) In this respect, the Board found that the parties "were on the cusp of *finalizing* an agreement." (emphasis added) 2017 WL 2402772 *1 at fn. 1. A few sentences later in its Motion, the Employer acknowledges, "In this case, the parties reached a tentative agreement." (Er. Mtn. for Reconsideration, p. 10) A tentative agreement by its very nature is not final. Thus, there was no material error of fact in this respect.

Even if the Board did commit some error of fact (which it did not), the Employer has not demonstrated that any such errors were material, such that they impacted the outcome of the case. The failure to do so is fatal to the Employer's Motion.

As noted, the purpose of a motion for reconsideration is not to repeat and rehash previously rejected arguments. 319 F.Supp.2d at 34. Rather, the purpose of such a motion is to correct manifest and material issues of law or fact. 85 F.Supp.3d at 58. In sum, the Employer has not raised a material issue of law or fact, or extraordinary circumstances warranting review. Rather, the Employer merely rehashes arguments already addressed and rejected by the Board. The Board should, therefore, DENY the Employer's Motion for Reconsideration.

B. <u>The Employer's Argument that the "Board and Regional Director failed to conduct a hearing on causation, as required by *Saint Gobain*" Cannot Be Raised for the First Time in a Motion for Reconsideration and Therefore Should Be Disregarded[2].</u>

It is well settled in federal courts that a motion for reconsideration should not be used as a vehicle for presenting new legal theories or arguments. *Loumiet v. United States*, 65 F. Supp. 3d 19, 24 (D.D.C. 2014)); *see also Kennedy v. Dist. of Columbia*, 145 F.Supp.3d 46, 49 (D.D.C. Nov. 16, 2015) ("A motion for reconsideration is emphatically not the proper place to raise new legal arguments."). The purpose of a motion for reconsideration is not to give "an unhappy litigant an additional chance to sway" the Board. *Durkin v. Taylor*, 444 F.Supp. 879, 889 (E.D. Va. 1977).

Here, the Employer asserts for the first time that the Board and/or the Regional Director should have held a hearing, examining the causation between the "action of the employer" and any affects upon the second petition. (Er. Mtn. for Reconsideration, p. 11) This argument has not been raised prior to the instant Motion for Reconsideration. The Board cannot reconsider a theory that was not previously advanced. Moreover, it is well settled that a motion for reconsideration is not a means through which a party can submit new arguments. 65 F.Supp.3d at 24; 145 F.Supp.3d at 49. As such, any reference to this argument should be disregarded by the Board.

[2]The Board's position on whether entirely new legal theories may be advanced in a motion for reconsideration is not well developed. *See*, *e.g.*, *Wang Theatre, Inc*., 365 NLRB No. 33 slip op. at *1 (2017) (Member Miscimarra stating in concurrence of dismissal of motion for reconsideration that the "Board will not grant a request for reconsideration absent extraordinary circumstances or *new arguments not previously considered by the Board*." (emphasis added) However, the Union's position is that, similar to federal courts, new legal theories should not be advanced in a motion for reconsideration absent unusual circumstances, such as an intervening change of controlling law; the availability of new, previously undiscoverable evidence; or the need to correct a clear error or prevent manifest injustice—none of which are present here. To hold otherwise would violate fundamental principles of *res judicata*.

C. <u>The Employer's Argument that the "Board and Regional Director failed to conduct a hearing on causation, as required by *Saint Gobain*," is Irrelevant and *Saint Gobain* is Inapplicable.</u>

In *Saint Gobain*, 342 NLRB 434, 434 (2004), the Board held that the causality between employer ULPs and employee disaffection relative to a decertification petition must be determined in an evidentiary hearing. In *Saint Gobain*, the Employer allegedly made an unlawful change in health insurance benefits. *Id*. at 434. Approximately three months later, a decertification petition was filed. *Id*. The Regional Director dismissed the petition, concluding, without a hearing, that the alleged unilateral change caused employees to reject the Union, thereby tainting the petition. *Id*. The Board reversed the Regional Director's decision and remanded the matter for further action consistent with its finding that the causal relationship between employer ULPs and employee disaffection should be determined in an evidentiary hearing. *Id*.

Saint Gobain is inapplicable. First, in the instant case, the Region and Board were not called upon to make any causal determinations between ULPs and an incumbent union's subsequent loss of majority support. Both the Region and the Board applied the law to undisputed, well-developed facts surrounding the petition itself. Therefore, no causation hearing is required.

Second, the Employer argues, "The instant Petition for Decertification was dismissed without a hearing to determine whether a nexus exists between CTS's actions and the filing of the Petition for Decertification." (Er. Mtn. for Reconsideration, p. 12) The Employer seems to conflate its alleged unlawful actions with respect to a prior decertification petition (which was voluntarily withdrawn) as bearing relevance on the Region's and Board's decision with respect to the instant decertification petition (which was dismissed pursuant to the Board's "settlement

bar" doctrine). The Employer's prior alleged unlawful conduct bears no relevance to the Board's analysis. Rather, the underlying dispute centers on whether and when a recently executed settlement agreement requiring mandatory bargaining serves as a bar to questions concerning representation. *Saint Gobain* does not address that issue. *Poole Foundry* and its progeny squarely address that issue and were appropriately applied and examined by the Board in the instant case. As such, *Saint Gobain* is inapplicable.

IV. CONCLUSION

Because the Employer has failed to demonstrate extraordinary circumstances or material errors of law or fact warranting review of the Board's decision, the Employer's Motion for Reconsideration ought to be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Union's Brief in Opposition to the Employer's Motion for Reconsideration was filed electronically with the Office of the Executive Secretary on July 6, 2017. A copy was also submitted to the following individuals via mail and/or email.

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